



POLICE DEPARTMENT

In the Matter of the Disciplinary Proceedings : X

- against - : FINAL

Police Officer Marco Cortes : ORDER

Tax Registry No. 954669 : OF

Housing Borough Manhattan : DISMISSAL

X

Police Officer Marco Cortes, Tax Registry No. 954669, Social Security No. ending in [REDACTED], having been served with written notice, has been tried on written Charges and Specifications numbered 2016-16097, as set forth on form P.D. 468-121, dated July 12, 2016, and amended on January 29, 2018, and after a review of the entire record, is found Guilty as charged.

Now therefore, pursuant to the powers vested in me by Section 14-115 of the Administrative Code of the City of New York, I hereby DISMISS Police Officer Marco Cortes from the Police Service of the City of New York.

JAMES P. O'NEILL
POLICE COMMISSIONER

EFFECTIVE: 8/1/19



POLICE DEPARTMENT

June 19, 2019

In the Matter of the Charges and Specifications : Case No.

- against - : 2016-16097

Police Officer Marco Cortes :

Tax Registry No. 954669 :

Housing Borough Manhattan :

At: Police Headquarters
One Police Plaza
New York, NY 10038

Before: Honorable David S. Weisel
Assistant Deputy Commissioner Trials

APPEARANCES:

For the Department: Anna Krutaya and Daniel Rabaev, Esqs.
Department Advocate's Office
One Police Plaza, 4th Floor
New York, NY 10038

For the Respondent: Roger S. Blank, Esq.
387 Park Avenue, 5th Floor
New York, NY 10016

To:

HONORABLE JAMES P. O'NEILL
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NY 10038

CHARGES AND SPECIFICATIONS

1. Said Police Officer Marco Cortez, on or about July 10, 2016, while off-duty and assigned to the 60th Precinct, engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department, in that, said Police Officer Cortez wrongfully operated a motor vehicle while his blood alcohol level was .074 per centum. *(As amended)*
P.G. 203-10, Page 1, Paragraph 5 General Regulations
VTL SECTION 1192(3) Operating A Motor Vehicle While Under The Influence Of Alcohol Or Drugs
2. Said Police Officer Marco Cortez, on or about July 10, 2016, while off-duty and assigned to the 60th Precinct, engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department, in that, said Police Officer Cortez wrongfully operated a motor vehicle while his ability was impaired by the consumption of alcohol. *(As amended)*
P.G. 203-10, Page 1, Paragraph 5 General Regulations
VTL SECTION 1192(3) Operating A Motor Vehicle While Under The Influence Of Alcohol Or Drugs
3. Said Police Officer Marco Cortez, on or about July 10, 2016, while off-duty and assigned to the 60th Precinct, engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department, in that, said Police Officer Cortez was unfit for duty. *(As amended)*
P.G. 203-04, Page 1, Paragraph 2 Fitness For Duty
4. Said Police Officer Marco Cortez, on or about July 10, 2016, while off-duty and assigned to the 60th Precinct, engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department, in that, said Police Officer Cortez left the scene of an accident without contacting 911 and without making required notifications. *(As amended)*
P.G. 203-10, Page 1, Paragraph 5 PUBLIC CONTACT - PROHIBITED CONDUCT
GENERAL REGULATIONS
5. Said Police Officer Marco Cortez, on or about on or about November 2, 2016, while assigned to the Housing Borough Manhattan, did intentionally make false statements during his official Department Interview, to wit; said Police Officer stated that the vehicle with which he had collided during a Motor Vehicle Accident fled the scene, when that was in fact not true. *(As amended)*
P.G. 203-08, Page 1, Paragraph 1 MAKING FALSE STATEMENTS
GENERAL REGULATIONS
6. Said Police Officer Marco Cortez, on or about on or about November 15, 2016, while assigned to the Housing Borough Manhattan, did intentionally make false statements during his official Department Interview, to wit; said Police Officer stated that the drivers side seat where he fell asleep was in the upright position,

when that was in fact not true, as he was observed sleeping in a reclined drivers seat by Police Officer Thomas Doherty. (As amended)

P.G. 203-08, Page 1, Paragraph 1 MAKING FALSE STATEMENTS
GENERAL REGULATIONS

7. Said Police Officer Marco Cortez, on or about on or about November 2, 2016, while assigned to the Housing Borough Manhattan, did wrongfully engage in conduct prejudicial to the good order, efficiency, or discipline of the Department, to wit: said Police Officer made misleading statements during his official Department Interview by stating he did not speak to anyone after being involved in a motor vehicle accident, when that was in fact not true. (As amended)

P.G. 203-10, Page 1, Paragraph 5 PUBLIC CONTACT - PROHIBITED CONDUCT
GENERAL REGULATIONS

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before the Court on March 28 and April 1, 2019. Respondent, through his counsel, entered a plea of Not Guilty to Specification Nos. 5 through 7. Respondent pleaded Guilty through his counsel to Specification Nos. 1 through 4 and testified in mitigation of the penalty. He also testified generally on his own behalf. The Department called Police Officers Damian Brennan and Ryan Eskridge and Lieutenants Hong Chen, Douglas Moodie and Richard Tully as witnesses. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

Having reviewed all of the evidence in this matter, the Court finds Respondent Guilty.

ANALYSIS

Introduction

The underlying facts in this case basically are undisputed. The following is a summary of them. At approximately 2245 hours on July 10, 2016, Respondent, while

driving off duty, was involved in an automobile collision with a vehicle driven by Individual 1 at the intersection of 164th Street and westbound Horace Harding Expressway (the service road of the Long Island Expressway) within the confines of the 109 Precinct in Queens. Individual 1's vehicle remained at the scene. Respondent drove his vehicle several blocks away, to Booth Memorial Avenue between 162nd and 163rd Streets. Booth Memorial is a two-way street but Respondent parked the car on the side of the street that was facing traffic. At some point thereafter, several occupants from Individual 1's vehicle found Respondent there and spoke to him. The occupants recorded cellphone video of this encounter, in which Respondent interacted with them.

Around 0200 hours, officers located Respondent and his vehicle, still on Booth Memorial. Respondent was in the driver's seat, fully reclined. Because officers suspected that Respondent was intoxicated, he was arrested and taken to the Intoxicated Driver Testing Unit (IDTU). There, he was subjected to a breathalyzer test at 0522 hours. The result was a blood alcohol content of 0.074, slightly below the legal driving limit of 0.08. While it was uncontested at the Department trial that Respondent would have had a BAC at or above 0.08 at the time of the collision, [REDACTED] [REDACTED]
[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]
[REDACTED] [REDACTED]

Respondent has pleaded Guilty here to the first four specifications: driving with a BAC of 0.074, driving while ability impaired, being unfit for duty, and leaving the scene of an accident without calling 911 or notifying the Department.

The contested issues at trial concern three answers Respondent gave at his three official Department interviews, two in November 2016 and one in May 2017. There, he

stated that the other vehicle fled the scene; that he was sitting in the upright position in his car when officers approached him;¹ and that he did not speak to any other individuals after the accident. The Department has charged that the first two statements were "intentionally false" and the third was "misleading."

Respondent has now conceded that all three of these statements were untrue as a factual matter. He asserts, however, that he had no intention to deceive the Department, and only was giving his current sober recollection of events that took place when he was intoxicated. Thus, he contends, the penalty should be consistent with the precedential penalty for a first DUI offense without injury: 30 days and a year of dismissal probation. The Department has argued that the statements were not just factually false statements but were intentionally false and misleading attempts by Respondent to create a false narrative of the events of the evening or otherwise deceive investigators, and warrant termination.

Facts

POLICE OFFICER DAMIAN BRENNAN was assigned to the 109 Precinct. He worked the first platoon, beginning at 2315 hours on July 10, 2016, and going into July 11, 2016.² He and his partner, Police Officer Thomas Doherty, responded to a radio run for a suspicious vehicle at 163rd Street and Booth Memorial Avenue. Brennan found the 911 callers at 164th Street and Booth Memorial. They pointed him to the vehicle (A. 19-24).³

¹ Specification No. 6 charges that Respondent "was observed sleeping in a reclined drivers seat by Police Officer Thomas Doherty." Doherty, however, did not testify; his partner, Police Officer Damian Brennan, did, and testified that he observed Respondent in that position. This was not objected to by the defense; in fact, the discrepancy was not mentioned at all during trial. In any event, because there is no material difference if "by Police Officer Thomas Doherty" is omitted, the Court has addressed the specification in that manner.

² References in the transcript to working a "2315x0750" tour and the like on "July 10, 2016," have been emended to state that the tour was for the first platoon on July 11, 2016. In other words, the tour started at 2315 hours on the 10th, but the majority of it was performed during the first platoon on the 11th.

³ References to "A." are to the transcript of March 28, 2019; references to "B." are to the transcript of April 1, 2019.

At 163rd Street and Booth Memorial Avenue, Brennan observed a vehicle parked on the north side of the street. It was parked on Booth Memorial in the wrong direction, i.e., it was facing east but on the westbound side of the street. It appeared to have been involved in a collision, as there was extensive damage on the passenger side. The front passenger window was broken. There was one occupant in the vehicle, Respondent. He was asleep, "in a groggy, sleepy demeanor." Brennan woke him up by shaking his leg. He was in the driver's seat, fully reclined. Brennan did not smell alcohol and he did not immediately suspect Respondent was intoxicated. There was a parking placard in the car and Brennan confirmed that Respondent was a member of the Department. Although it appeared that the vehicle had been in a collision, Respondent denied that he had been in one. He asserted that he was safeguarding his vehicle (A. 22-27, 32-35).

Brennan testified that a report of a vehicle accident at 164th Street and westbound Horace Harding Expressway came over the radio. The two individuals to whom Brennan previously had spoken approached him and said that Respondent's vehicle was the one involved in the accident. Brennan notified the patrol supervisor, then-Sergeant Hong Chen. Respondent told Chen that his friend called him and told him his vehicle had been in an accident, while the friend was driving it, and Respondent needed to secure it. Brennan later viewed a video taken from "somebody at the scene of the accident" in which Respondent admitted he had been driving the vehicle (A. 27-31, 34-36).

Chen went to the scene of the accident as well as Respondent's residence. Respondent mentioned that he lived around the corner from 163rd and Booth Memorial. Once Respondent refused to take a breathalyzer test, [REDACTED]

[REDACTED] (A. 30).

LIEUTENANT HONG CHEN previously was assigned to the 109 Precinct as a sergeant. He was assigned as the patrol supervisor on the first platoon for July 11, 2016. Brennan informed him at approximately 0230 hours of a suspicious vehicle, parked the wrong way, involving an off-duty member of service. When Chen arrived at the scene, he could smell alcohol on the breath of Respondent, the Department member in question. He was unsteady on his feet, and had slurred speech and watery eyes. The passenger side of Respondent's vehicle, located on Booth Memorial Avenue about 25 to 30 feet west of 164th Street, was severely damaged with airbags deployed (A. 38, 40-42, 48, 56-57; Dept. Exs. 2a-d, photos of Respt.'s vehicle at scene, taken by Chen).

Respondent told Chen that he had lent the vehicle to his friend, [REDACTED] The car had been severely damaged, so Respondent decided to stay overnight with the car to secure it. Respondent gave Chen two contact phone numbers for [REDACTED] One went to voicemail, and at the other, a female answered and said no one by that name lived there. Respondent also told Chen that he had one beer at 1900 hours the night before at home, which was where he was before going to his car. Respondent did not appear confused about Chen's questions or express uncertainty about what had happened to his car (A. 42- 45, 58-59).

Once Brennan informed Chen that there had been an automobile collision at 164th Street and Horace Harding Expressway, Chen went to that location and met the other motorist, Individual 1. Individual 1 told Chen that at approximately 2300 hours or maybe slightly before, she was stopped at a red signal on westbound Horace Harding and 164th, driving a red Nissan Rogue. There were four other occupants of her car. When she proceeded through the green signal, a black vehicle traveling north on 164th hit the front of her car at

a high rate of speed. The other car kept going and fled the scene. The driver was a male wearing a red shirt. Chen observed that the front bumper of Individual 1's vehicle had completely come off. Individual 1 stated that she had remained at the scene the entire time (A. 45-47, 49, 60-61-63; Exs. 1a-f, photos of Individual 1's vehicle at scene, taken by Chen).

One of the occupants of Individual 1's vehicle provided Chen with a video of Respondent interacting with another individual. In the video, Respondent is at the driver's side of his vehicle on Booth Memorial Avenue. He is wearing a red shirt. One of the occupants implores Respondent not to drive, telling him that he is "not good." Respondent insists, "I'm good." The occupant asks, "Are you even okay?," and Respondent answers, "My car got hit." He insists that he is alright and is just trying to get his stuff out of the vehicle. Chen testified that Respondent was wearing the same attire from the video when he first encountered him (A. 52-53, 59; see Ex. 3, video).

Chen testified that he informed the duty captain an off-duty member of service was suspected of leaving the scene of an accident. Once the captain arrived and Respondent refused the breathalyzer test, [REDACTED]. Chen indicated that Respondent was taken to the Intoxicated Driver Testing Unit, where he did submit to a breathalyzer. The result was 0.074 blood alcohol content (A. 54-56).

Chen clarified that the delay in the police response to the collision was due to the call originally being assigned to the 107 Precinct, as the Long Island Expressway was the border between the two precincts (A. 63-64).

POLICE OFFICER RYAN ESKRIDGE was assigned to Highway Unit 3 on July 11, 2016, as the conditions officer on the first platoon. His responsibilities included the interdiction of

driving under the influence. He was trained in breathalyzer and field sobriety testing (A. 66-69).

Eskridge testified that the rate of metabolism of alcohol in the human body was typically between 0.015 to 0.020 per hour. If a person has a typical American beer with 5% alcohol by volume, finishes it, and waits an hour, her breathalyzer theoretically would read zero. If, however, the rate of consumption exceeds the rate of elimination, the blood alcohol content increases (A. 82-83, 86-88).

Eskridge testified that he administered the sobriety tests to Respondent at the IDTU facility. He began observing Respondent at 0450 hours on July 11, 2016. The general practice was to conduct a 20-minute observation, which also allowed any residual alcohol in the subject's mouth to dissipate. On the breathalyzer, which Eskridge administered to Respondent at 0522 hours, the subject is expected to take a deep breath and blow into the analyzer tube. The ethanol in the breath then is analyzed. Respondent's result was 0.074 blood alcohol. Extrapolating backward in time, and considering that Respondent could not have imbibed more alcohol after 0130 hours, at midnight or even at 2300 Respondent would have been "significantly intoxicated," with a BAC of perhaps 0.150. This was based on a hypothetical scenario outlined in Respondent's official Department interviews, in which he stated that he had two beers around 2030 to 2130 hours, and three beers between 0000 and 0130 hours (A. 69-73, 76-77, 90, 92-93, 95-97, 100-01).

Eskridge also conducted a coordination test on the subject. This included seeing if the subject could walk and turn, stand on one leg, and touch his finger to his nose, in a coordinated manner. Eskridge noted "one clue of impairment" during the first test on Respondent, an "improper turn." During the leg stand test, Respondent put his foot down

once, another "clue" of impairment. Respondent also missed one out of six tries to touch his finger to his nose. *Ceteris paribus*, a sober person is expected to perform the tests perfectly (A. 73-74, 77-81, 93-95).

Eskridge's overall conclusion was that Respondent was "under the influence of intoxicating beverages or drugs" (A. 81-82; see Dept. Exs. 4 & 5, IDTU paperwork and results).

LIEUTENANT DOUGLAS MOODIE had been assigned to the Brooklyn South Investigations Unit as a sergeant and was assigned to Respondent's case (A. 107-08).

Respondent's first of three official Department interviews was on November 2, 2016 (see Ex. 6, transcript). According to Moodie, Respondent stated that he was driving home from his cousin's house when he got "T-boned" by another vehicle at 164th Street and Horace Harding Expressway. Respondent named his *cousin's* husband – not his friend – as

[REDACTED] The other vehicle left, and because he was so close to home, Respondent decided not to call 911 and instead went home, intending to call the 109 Precinct the next day. He said that the parking space facing traffic was the most convenient place to park. At home, Respondent consumed three Samuel Adams beers. He returned to his vehicle to check on the damage and see if the damaged door could close. While there, he fell asleep (A. 112-18, 121).

Moodie testified that Respondent did not seem confused about any of the questions, but did express that he could not recall details after he had begun drinking (A. 116-17).

Respondent's second official interview was on November 15, 2016. This time, the primary interviewer was Moodie's supervisor at the time, **LIEUTENANT RICHARD TULLY**. It was Tully's decision to conduct a second interview (see Ex. 7, transcript). Respondent

stated at the second interview that after work on July 10, 2016, he went to a diner and then to his cousin's house, arriving around 2030 to 2100 hours. He identified his cousin's husband as [REDACTED]. Respondent left around 2230 to go home. While driving north on 164th Street, he was "T-boned" by another car at the intersection of Horace Harding Expressway. According to Respondent, the other car fled the scene, and Respondent continued on 164th toward his home about two blocks away. Respondent stated that he observed the other vehicle continue west on Horace Harding for five or six blocks. Respondent turned left and parked in the wrong direction on Booth Memorial Avenue. Once at home, Respondent drank three Sam Adams, but he denied drinking any alcohol before the accident. He intended to contact the 109 Precinct the next day. He denied having any conversations with any civilians near where he had parked. Around 0030, Respondent returned to his vehicle to check on the damage and see if it could be secured. Within seconds of sitting in the driver's seat, he fell asleep. Respondent contended that his seat was completely upright. Respondent did not recall telling Chen that he was not driving (A. 117, 127, 130; B. 3-9, 11-14, 22, 25, 29-30, 32).

Tully testified that Respondent later amended his statement about how far the other vehicle travelled to one to two blocks (B. 13).

Tully testified that one of the phone numbers Respondent gave Chen on the night of the incident came back to a [REDACTED]. Tully verified that [REDACTED] was in fact Respondent's cousin (B. 10).

Respondent's third official interview took place on May 19, 2017. There, he said that he did not know anyone named [REDACTED], and asserted the person of whom he had been speaking was named [REDACTED]. Respondent again did not recall telling

Chen that [REDACTED] was driving. Tully conceded at trial that it was the investigators who brought up [REDACTED] during the interviews. Respondent, at the third interview, again maintained that he was sober at the time of the accident (B. 14-15, 29-30, 32-33).

RESPONDENT contended that he did not actually know how many drinks he had on the night in question. Originally, he answered on cross examination that it was possible he drank at a diner after leaving work at approximately 1805 hours, as well as at his cousin's house. Several questions later, he amended that to state that he began drinking at his cousin's. When asked on cross examination, Respondent indicated that he had three "Sam Adams" there. He was asked if they were "[s]tandard bottle, can?" and answered, "Bottle." The Court, upon its own examination later, asked specifically if it was Samuel Adams Boston Lager, "the regular beer, no special variety?" Respondent then specified that it was Samuel Adams Rebel IPA. He agreed that this was "a higher alcohol by volume probably than a standard beer." He first realized he was drinking IPAs when speaking to one of his cousins after the second interview. When the Advocate asked Respondent whether those three beers affected his later perception of the accident, he stated that he only *remembered* having three beers, and it could have been more. He equivocated several times on whether he drank anywhere else before the accident besides his cousin's house, but eventually testified that was the only place (B. 41-48, 71-73, 77-78).

In any event, Respondent conceded that he was intoxicated at the time of the accident around 2300. He conceded his guilt of the first four specifications: he operated a vehicle with a BAC of 0.07, he operated a vehicle while his ability was impaired, he was unfit for duty, and he left the scene of the accident without calling 911 or otherwise notifying the Department. He was unsure whether he had additional drinks after he

arrived home. He might have had none or as many as five. At the time of his official Department interviews, Respondent believed he only had drunk alcohol once he arrived home (B. 35-36, 42-43, 54-55, 76-77).

Respondent asserted that the answers he gave at his official interviews were "clouded" by his "perceptions" of his alcohol consumption. Even now, he still was not entirely sure of what occurred that night. Respondent denied that when the investigators told him much of his account did not make sense, it was an indication his memory was incorrect. This included investigators telling Respondent that the other car, which supposedly fled the scene, was actually found at the scene. It also included them asking him how he, as a police officer, could think he only had three beers if his BAC was 0.074 perhaps five hours later. To him, that number meant he was under the influence but below the legal limit. Respondent asserted that he first realized his perceptions were incorrect after his final official interview. "It dawned on me" at that point that he might have been more intoxicated than he thought. He did not contact the investigators to correct his statements, contending that he did not have a lot of time on the job and did not know he could do that (B. 38, 51-53, 56-58, 66-67).

Respondent then testified that he realized *by the time of* his third interview that he had been intoxicated during the accident. He knew that his perceptions of his level of intoxication were incorrect, but did not realize how off they were until the IDTU officer, Eskridge, testified. He did not correct his prior interview statements in which he denied this. [REDACTED]

[B. 39-40, 61-63, 72, 78].

Respondent admitted that in a civil deposition on August 10, 2018, related to the auto insurance case between him and the other driver, he stated that he only had two beers prior to the accident (A. 143-44; B. 68-69).

Respondent also "perceived it as the other driver left the scene," agreeing with his counsel's suggestion that this was because "you were driving away from the scene of the accident that you yourself were leaving." Respondent also said that he looked at his rearview mirror and did not see the other car, so he "just assumed they kept going." He "believed at the time" that the other vehicle had traveled a few blocks. Respondent said at his official Department interviews that he saw red taillights, and therefore thought the other vehicle was "speeding" away. Respondent admitted at trial that this was inaccurate. He claimed that he first understood this during the IDTU officer's testimony about his likely severe intoxication at the time of the accident. He "began to realize my perception was not as great" (B. 36-37, 40, 45, 49-50, 64, 75).

Respondent testified that he did not recall what position his seat was in when he fell asleep. Respondent claimed that when Tully asked in the second interview, "The seat was upright?" and he answered, "Mm-hmm" (p. 24), he simply "agreed with [Tully's] statement" (B. 40).

Respondent testified that he did not remember speaking to anyone after the accident, in the vicinity of his vehicle, other than responding officers. He conceded that he was on video speaking and interacting with other individuals, telling them everything was fine and he just wanted to get his belongings out of the car. He claimed that he had no memory of this actually occurring (B. 40-41, 55-56).

Respondent confirmed that his cousin's husband was named [REDACTED] He knew of no one named [REDACTED]. While Respondent asserted he did not remember what he told Chen, the patrol supervisor, he nevertheless thought that the name [REDACTED] [REDACTED] "came up because I said it" when Chen questioned him on the night of the incident. Respondent contended that he was "very intimidated" during his first and second official interviews. When he heard the name [REDACTED], "I just went along with it because I did hear [REDACTED] and I said yes, that's him" (B. 58, 76).

Analysis

Respondent has pleaded Guilty to the first four specifications: driving with a blood alcohol content of 0.07, driving while ability impaired by alcohol, being unfit for duty, and failing to notify 911 or the Department of the accident.

Respondent has argued that he is not guilty of the remaining charges of making misleading or intentionally false statements in his official Department interviews. In the first and second interviews – the third focused on the identity of [REDACTED] or [REDACTED] – Respondent stated that the other vehicle fled the scene (Specification No. 5); that he was sitting in the upright position in his car when officers approached him (Specification No. 6); and that he did not speak to any other individuals after the accident (Specification No. 7). Respondent's argument essentially is that he was so drunk at the time of the incident, he was unable to correctly recall, while sober at the interviews, what actually happened. Thus, while Respondent now agrees that the statements were factually incorrect, he asserts that they were neither misleading nor intentionally false, because he had no intent to deceive. He contends that he gave an honest sober recollection at the interviews of what had occurred during the incident.

First, the Court rejects Respondent's argument that the untrue statements did not alter the course of the investigation or change the investigators' conclusion that he was driving while intoxicated. This was based, first and foremost, on the blood alcohol content of 0.074 almost five hours after Respondent, even by his statements in the interview, had stopped drinking (B. 80-82). Respondent, however, is not charged with impeding the investigation. He is charged with making false and misleading statements. Whether those statements impeded or interfered with the investigation is immaterial.

The Court rejects Respondent's broader defense for several reasons. First, his claims in the interviews make no sense on their face. He stated that after his vehicle was struck, he "continued going forward. . . And then once I was out of the way," the other car "continued going down the road" (first interview, p. 8). Following up at the second interview, Respondent stated that the other vehicle traveled for at least one to two and as many as five to six blocks (p. 12).

The problem is that it would have been physically impossible for Respondent to see the other car traveling west on Horace Harding Expressway from the collision if he himself was heading north on 164th Street. He would have had to have seen around the corner, in fact for a long enough period to see the other car's taillights fade away (second interview, pp. 12-13). No reasonable person could have thought this actually happened. The reasonable conclusion is that it was an intentionally false statement on Respondent's part.

Respondent's explanation about the seat being upright or reclined similarly makes no sense. He stated in the second interview that when he returned to his vehicle from his house, he was tired and had had a few drinks, so he fell asleep in the driver's seat. He fell

asleep within “[a] few seconds.” He denied reclining the seat and agreed with the investigator that it was upright (pp. 23-24).

Respondent himself acknowledged in his first interview that his account did not “sound normal” (pp. 15-16). In fact, it departs sharply from common sense and general human experience. The Court does not find it credible that Respondent could believe he sat in a completely upright seat and fell asleep within a few seconds. The reasonable conclusion is that it was an intentionally false statement on Respondent’s part.

Finally, Respondent claimed that he did not speak to anyone after the incident. This was contradicted by the video (Ex. 3), in which several occupants of the other vehicle involved in the collision interact and speak with Respondent at the location where he parked his vehicle. Respondent makes several statements and comments to the other people.

At the second interview, the investigator, Tully, asked Respondent if he had any conversations with any civilians at that location. Respondent denied it, twice. Tully warned, “No? You certain you don’t want to rethink that? Are you . . . aware again of . . . lying under, on the Department? Okay?” Respondent affirmed that he was certain. Respondent was confronted with the details of a 911 caller who stated that a driver of a black Nissan (see Exs. 2a-d, photos of Respt.’s vehicle) was at that location, “possibly intoxicated and can’t stand.” Respondent again denied speaking with anyone (pp. 18-19, 21-22).

The Court does not credit Respondent’s trial assertion that he had no memory of this occurring. At the interview, Respondent allegedly forgot having a conversation that lasted over a minute with several individuals. This is despite the fact he allegedly *did* recall

that: (1) there was glass all over the passenger side of his car; (2) the other vehicle did not stop at all; (3) he went inside his residence because he decided to do the police accident report the next day, as it was late at night and he did not feel well; (4) what he was wearing at the time of the collision and what he changed into, including the colors and styles of his clothes; (5) what he did at home, including taking a shower, watching TV and having exactly three Sam Adams; (6) how long he stayed at home; and (7) returning to his car “to see if the doors were closed” (Respondent never explained why this mattered if the windows were shattered) and to retrieve his insurance information (pp. 11, 13-16, 19-23). His outright denial at the interview – not a mere failure to recall – of speaking to others after the collision was, as the specification charges, a misleading statement, to say the least.

Strikingly, Respondent literally had no explanation for why he only now believes he fled the scene and the other car remained; his seat was reclined and not upright; and he spoke to several individuals. He explained at trial that the testimony of the IDTU officer in particular led him to conclude that he was more intoxicated than he had thought. But he gave no testimony as to why he has now concluded the three interview statements in question were incorrect. He knew at the time of the interviews that a 911 caller had seen him, at the parking spot, possibly intoxicated and unable to stand. He also was confronted during the interviews with the other driver’s 911 call information that she was involved in a collision at 164th and Horace Harding and that officers responded and found her vehicle at that location. Respondent had no explanation why he had a different belief then about leaving the scene and speaking to other individuals, as opposed to now. The reasonable explanation is as the Advocate argued on summation: Respondent “created a story and

stuck to that story until he realized it would be more beneficial to him to admit that he was intoxicated because being intoxicated would be an excuse for his lies" (B. 95).

The Court rejects Respondent's suggestion that his interview statements were mere denials of misconduct (B. 26, 84). It is true that in order to prove a false statement, the Department must demonstrate that the statement was not only false, but also was not a mere denial of an administrative charge of misconduct. This is in contrast to statements that create a "false description of events." See Patrol Guide § 203-08, Note, para. 3.

Respondent's false and misleading statements were far from mere denials. At the time of the interviews, Respondent was denying that he had driven while intoxicated. He maintained that he only drank after the collision, thus accounting for his blood alcohol content. To further that account, it was in Respondent's interest to state that it was the other driver who was in the wrong: he "got T-boned" by a reckless driver who then wrongfully fled the scene (first interview, pp. 5, 8, 12). It also was in Respondent's interest to make it seem like he was a sober individual checking on his car, rather than an intoxicated person who was so drunk he chose to recline his car seat all the way back and sleep there. Respondent thus adopted and furthered a false narrative and description of events. His lies were far from immaterial.

Respondent's denial of speaking to anyone after the accident was not a denial of an administrative charge of misconduct, as it is not misconduct to speak to someone after an accident. This too created a false narrative of events. Respondent appears intoxicated on the video. His denial of the interaction was yet another way in which he attempted to create a narrative in which he was the wronged party and had not been driving drunk. The investigators were not so interested in finding out whether Respondent had spoken to

anyone. They already had the video and knew that he had done so. By stating that he had not done so, Respondent further attempted to hide evidence of his misconduct by making it appear there were no relevant witnesses to his intoxication.

As such, the Court finds Respondent Guilty of Specification Nos. 5 through 7.

PENALTY

In order to determine an appropriate penalty, Respondent's service record was examined. See Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 240 (1974). Respondent was appointed to the Department on July 9, 2013. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum. Respondent also submitted several letters of recommendation from supervisors in support of a non-separation penalty.

The Department has requested that Respondent be terminated from employment and this tribunal agrees. Respondent has been found Guilty of driving while ability impaired, just under the legal limit. He also has been found Guilty of being unfit for duty, and leaving the scene of a collision without reporting or notifying the Department.

This alone is egregious misconduct. But three months after the incident, having already resolved his criminal DUI case, and having had an opportunity to reflect upon the importance of being truthful in Department interviews, Respondent engaged in a pattern of denial and deception which he maintained through his trial before this Court. Even with respect to matters which were not directly material to the findings of guilt in this case, Respondent equivocated and minimized on several occasions.

Respondent testified that he still was unsure of what actually occurred on the night in question. For example, Respondent testified that it was possible he drank at the diner

after leaving work. Only several questions later, he amended that to state that he began drinking at his cousin's. Similarly, Respondent originally indicated that he had three Sam Adams beers there. He was asked if they were "[s]tandard bottle, can?" and answered, "Bottle." The Court, upon its own examination later, asked specifically if it was Samuel Adams Boston Lager, "the regular beer, no special variety?" Respondent chose this as the apparent first time in the pendency of the case, interviews or trial, to recall that it was actually Samuel Adams Rebel IPA. India Pale Ales tend to have a higher alcohol by volume than most beers. The IDTU officer, Eskridge, indicated that three IPAs would lead to a higher BAC than three more common American beers like Budweiser. Similarly, when the Advocate asked Respondent whether those three beers affected his later perception of the accident, he stated that he only *remembered* having three beers, and it could have been more. He equivocated several times on whether he drank anywhere else before the accident besides his cousin's house, but eventually testified that was the only place. Similarly, Respondent had no recollection at trial of whether he drank after he returned home. He could have had zero beers or as many as five.

In this tribunal's view, Respondent, now having conceded he had driven drunk, and looking for a way to further his defense that he was so drunk he could not have accurately recalled the events during his interviews, attempted to stack the deck by testifying at trial in ways that suggested he had drunk very extensively, beyond the three beers he outright admitted.

The matter of the name of the husband of Respondent's cousin is another example of his continuing deception. Apparently the name of the individual is [REDACTED] Chen, the patrol supervisor, testified that Respondent gave him the name [REDACTED]

Respondent was asked at his first and second interviews about this individual. His defense that he heard the name [REDACTED] and "just went along with it" is incredible. He was asked point-blank, "Who's [REDACTED]" He answered, "My cousin's husband" (first interview, p. 29). This exchange was repeated at the second interview (p. 29). By the third interview, Respondent was asked who [REDACTED] was, and answered, "I don't recall." His counsel offered that there was "just a misunderstanding as to his first name" (pp. 4-5).

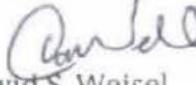
It is certainly possible that Respondent, drunk and slurring his speech (A. 41), told Chen [REDACTED]'s first name and Chen took it down as [REDACTED]. But at the interviews, Respondent still was denying that he had driven while under the influence. To admit that he said the name wrong, Respondent essentially would have conceded he was much more intoxicated than he claimed. He did not want to do this. He characterized this as "just [going] along with it." The Court characterizes it as false and misleading.

Respondent's interviews and testimony were a cavalcade of lies and equivocations. Going forward, it is difficult to envision a scenario where his word can ever be taken at face value while performing official police duties.

The penalty of dismissal is consistent with Department precedent for false and misleading statements during official interviews in which the member created a false narrative of events. See Case No. 2015-13842 (Nov. 3, 2017) (member got into physical altercation with family member who was babysitting concerning the fee, then "concoct[ed] a false scenario to avoid responsibility for his actions and persist[ed] in that falsehood, despite several opportunities to provide a true account"). Respondent's stunning lack of judgment here renders him unfit for continued service as a New York City Police Officer.

Accordingly, the Court recommends that Respondent be **DISMISSED** from employment with the Department.

Respectfully submitted,


David S. Weisel
Assistant Deputy Commissioner Trials

APPROVED


AUG 07 2019
JAMES P. O'NEILL
POLICE COMMISSIONER



POLICE DEPARTMENT CITY OF NEW YORK

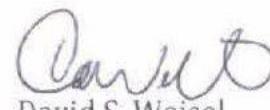
From: Assistant Deputy Commissioner - Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER MARCO CORTES
TAX REGISTRY NO. 954669
DISCIPLINARY CASE NO. 2016-16097

Respondent was appointed to the Department on July 9, 2013. For his last three annual performance evaluations, he received a 3.5 overall rating of "Highly Competent/Competent" in 2017 and 2016, and a 3.0 overall rating of "Competent" for 2015.

[REDACTED]

In connection with the instant matter, Respondent was suspended from July 11 to August 9, 2016. He also was placed on Level II Discipline Monitoring on September 19, 2016. Monitoring remains ongoing.

For your consideration.


David S. Weisel
Assistant Deputy Commissioner Trials